Yung Chen Wood Industries Sdn Bhd v Scott & English (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)-2376–10 OF 2013
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND ABANG ISKANDAR JJCA
8 MARCH 2016

Civil Procedure — Amendment — Order — Appellant sued respondent for breach of contract — Court found in favour of appellant and ordered respondent to pay damages — Extracted and sealed order did not reflect orders intended by trial judge — Appellant applied to amend sealed order — Whether court had power to allow amendment of perfected and sealed order

The appellant had purchased two generator sets from the respondent whereby the respondent had stated that the said generators could generate a power rating of 1000kw each. Nevertheless, when the generators were put into operation, the exhaust manifold would experience heat and glow red hot when the power production reached 650kw. The appellant then sued the respondent for breach of contract in supplying defective power generators. The learned judge found in favour of the appellant and via order dated 6 July 2006 ('the said order'), the learned judge ordered the respondent to pay for damages in accordance with prayer (i) of the statement of claim. The learned judge also disallowed the reliefs sought under prayers (ii) and (iii) of the statement of claim as the appellant had abandoned the same. However, upon clarification, the learned judge ordered that the assessment of damages to reflect the fact that prayers (ii) and (iii) were not abandoned. Only after the clarification the said order which did not reflect prayers (ii) and (iii) were extracted and sealed. The appellant in the court below applied to amend the said order to insert prayers (ii) and (iii) of the statement of claim, nevertheless, the learned judicial commissioner dismissed the said application, hence this appeal. The issue for court's consideration was whether the court had the power to allow the amendment of the said order after it had been perfected and sealed.

Held, allowing the appeal with costs of RM10,000 here and below:

(1) Based on the circumstances of the case, the proposed amendment to the said order albeit done quite late in the day was well within the power of the court to entertain. The proposed draft was not to introduce something new or never decided by the trial judge. The purpose was to clarify the orders intended by the trial judge, so that prayers (ii) and (iii)

of the statement of claim were given due consideration, in addressing the damages in favour of the appellant (see para 34).

[Bahasa Malaysia summary

Perayu telah membeli dua set generator daripada responden di mana responden telah menyatakan bahawa setiap generator tersebut boleh menjanakan kuasa pada kadar 1000kw. Walau bagaimanapun, apabila generator digunakan untuk operasi, paip ekzos akan mengalami panas dan bernyala merah apabila pengeluaran kuasa mencecah 650kw. Perayu kemudiannya menyaman responden bagi kemungkiran kontrak kerana membekalkan generator kuasa yang cacat. Hakim yang bijaksana memihak perayu dan melalui perintah bertarikh 6 Julai 2006 ('perintah tersebut'), hakim yang bijaksana memerintahkan responden untuk membayar ganti rugi mengikut permohonan (i) pernyataan tuntutan. Hakim yang bijaksana juga tidak membenarkan relif-relif yang dipohon di bawah permohonan (ii) dan (iii) pernyataan tuntutan kerana perayu telah meninggalkannya. Walau bagaimanapun, atas penjelasan, hakim yang bijaksana memerintahkan bahawa taksiran ganti rugi mencerminkan bahawa permohonan-permohonan (ii) dan (iii) tidak ditinggalkan. Hanya selepas penjelasan perintah tersebut yang mana tidak mencerminkan permohonan-permohonan (ii) dan (iii) diekstrak dan dimeterai. Perayu di Mahkamah Tinggi memohon untuk meminda perintah tersebut untuk memasukkan permohonan-permohonan (ii) dan (iii) pernyataan tuntutan tersebut, walau bagaimanapun, pesuruhjaya kehakiman yang bijaksana menolak permohonan tersebut, maka rayuan ini. Isu untuk pertimbangan mahkamah adalah sama ada mahkamah mempunyai kuasa untuk membenarkan pindaan terhadap perintah tersebut selepas ia telah dibetulkan dan dimeterai.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000 di mahkamah ini dan Mahkamah Tinggi:

(1) Berdasarkan keadaan kes, pindaan yang dicadangkan kepada perintah tersebut sekalipun dibuat agak lambat adalah masih dalam kuasa mahkamah untuk mempertimbangkan. Draf yang dicadangkan tidak memperkenalkan sesuatu yang baru atau yang tidak pernah diputuskan oleh hakim bicara. Tujuannya adalah untuk menjelaskan perintah-perintah yang diniatkan oleh hakim bicara, dengan itu permohonan-permohonan (ii) dan (iii) pernyataan tuntutan diberikan pertimbangan yang wajar, dalam memutuskan ganti rugi yang memihak perayu (lihat perenggan 34).]

Notes

For cases on order, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 695–703.

Cases referred to

Henry William Hatton v Hugh Harris [1892] AC 547, HL (refd)
Pearlman (Veneers) SA Pty Ld v Bernhard Bartels [1954] 1 WLR 1457, CA (refd)
Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd [1991] 2 MLJ 417, HC (refd)
Thynne (Marchioness of Bath) v Thynne (Marquess of Bath) [1955] P 272, CA (refd)

Legislation referred to

Rules of Court 2012 O 42 r 13
Rules of the High Court 1980 O 20 r 3, O 42 r 13

Appeal from: Suit No S-22–34 of 2000 (High Court, Sandakan)

Edwin Tan (Tan Pang Tsen & Co) for the appellant.
Norbert Yap (Norbert Yapp & Assoc) for the respondent.

Abdul Aziz Abdul Rahim JCA:

[1] The appellant was the plaintiff before the High Court. The respondent was the defendant. This is the plaintiff's appeal against the decision of the learned judicial commissioner at Sandakan High Court dismissing the plaintiff's application to amend the order given by the learned judicial commissioner on 6 July 2006 to insert prayers (ii) and (iii) of the plaintiff's amended statement of claim and the award of costs of RM7,000 for clarification of the order.

[2] The background facts leading to the plaintiff's application to amend the said order and this appeal are reproduced below from the judgment of the learned judicial commissioner:

> (a) On 11 November 2000, the plaintiff sued the defendant for breach of contract and conditions and warranties arising from the sale of the generator sets.
>
> (a) In the amended statement of claim dated 8 April 2001, the plaintiff had prayed amongst others for the following reliefs:
>
> (i) an order that the defendant repay to the plaintiff a sum of (405 x RM660,000 paid) ie RM246,000 and damages for diesel oil consumption for having to operate other generators sets to make up the power deficit of the generators sets for the duration of the life span of the two generators sets;
>
> (ii) further or in the alternative, for an order that the defendant do within one month from the date of judgment, replace the two generators sets with two brand new generator sets of similar make

and specifications capable of actually performing up to a power rating of 1000 KW each and install and set up in running conditions the same at the plaintiff's factory at Seguntor, at the defendant's own costs inclusive of all incidental costs;

(iii) or alternatively, for an order that the defendant do within one month from the date of judgment, supply install and set up in running condition at the plaintiff's factory at Seguntor another brand new generator set of similar make and specifications capable of actually producing at least 1000 KW to make up the power deficit of the two generator sets, at the defendant's own costs inclusive of all incidental costs;

(iv) damages and incidental costs involved in having to set up the new wiring, power lines connections, equipment installation, control panel network, etc in respect of additional generator sets to make up the power deficit of the two generators sets, to be assessed;

(b) the suit was tried before the learned trial judge commencing on 13 March 2006. At the conclusion of the trial, judgment was reserved and the decision was subsequently delivered on 6 July 2006 whereby the learned trial judge ordered that judgment be entered for the plaintiff with damages to be assessed by the deputry registrar and costs to be taxed unless agreed (see notes of proceeding dated 6 July 2006);

(c) the written judgment dated 6 July 2006, learned trial judge held that the plaintiff is not entitled to the reliefs sought in the amended statement of claim other than damages because they have been abandoned in learned counsel's opening statement (see p 11 of the written judgment dated 6 July 2006);

(d) Learned counsel for the Plaintiff requested for clarification to inform the learned trial Judge that the Plaintiff did not abandon the prayers (ii) and (iii). On the 10.08.2006, the Plaintiff's counsel appeared before the learned trial Judge requesting for clarification of p 11 of his Lordship's judgment. The Defendant's then counsel was not present. The Court adjourned the matter to 11.08.2006.

(e) On the 11.08.2006, the Plaintiff's counsel appeared before the learned trial Judge and it was recorded in the notes of proceedings that 'the damages to be assessed would hereby be Ordered to reflect the fact that prayers 2 and 3 were not abandoned.' [see Notes of Proceeding dated 11.08.2006].

(f) After clarification was made before the learned trial Judge, the Judgment was sealed under Enclosure 99 by the Deputy Registrar and was extracted by the Plaintiff's solicitors. For easy reference, the relevant part of the Judgment is reproduced as follows:

IT IS THIS DAY ORDERED THAT Judgment be entered against the Defendants and damages to be assessed by the Deputy Registrar to reflect

Prayers (ii) and (iii) of the Writ of Summons and costs to the Plaintiffs to be taxed unless agreed.

(g) Being dissatisfied with the said decision, the Defendant appealed to the Court of Appeal against the whole decision under Civil Appeal No S-02-800-2006. The Defendant relied on the sealed copy of the Judgment under Enclosure 99 which was also inserted in the Record of Appeal.

(h) However, the Defendant's appeal against the Judgment dated 6.07.2006 was dismissed with costs by the Court of Appeal on 14.04.2009.

(i) The Defendant subsequently filed a Notice of Motion for leave to appeal to the Federal Court on 13.05.2009 under Application No. 08(f)-102 of 2009(S) but was also dismissed by the Federal Court with costs on 17.08.2009.

(j) The Plaintiff then proceeded with the assessment of damages before the Deputy Registrar of the High Court under Enclosure 102. Enclosure 102 was fixed for hearing before the Deputy Registrar on 8.01.2008. In his Opening Speech dated 8.01.2008, the Plaintiff's counsel informed the Court that the Judgment Ordered that the damages should reflect prayers (ii) and (iii) of the Plaintiff's Statement of Claim.

(k) On 22.01.2009 the learned Deputy Registrar, delivered his ruling Ordering that damages in the sum of RM3,382,222.09 be awarded to the Plaintiff together with interest at 8% per annum from the date of the Order until full payment.

(l) Dissatisfied with the Deputy Registar's decision, the Defendant filed a Notice of Appeal to Judge in Chambers dated 23.01.2009 [Enclosure 158]. The appeal to Judge in Chambers was heard before Y.A. Puan Yew Jen Kie, Judicial Commissioner (as she then was) (hereinafter referred to as 'the learned Judicial Commissioner').

(m) On 10.12.2009, the learned Judicial Commissioner allowed the Defendant's appeal and set aside the award of RM3,382,222.09 and substitute it with RM264,000.00. The Defendant then paid the damages of RM264,000.00 to the Plaintiff.

(n) Aggrieved with the decision of the learned Judicial Commissioner, the Plaintiff appealed to the Court of Appeal on 31.12.2009 under Civil Appeal No. S-03(IM)-52-2010. On 12.12.2012, the Court of Appeal unanimously dismissed the Plaintiff's appeal and affirmed the decision of the learned Judicial Commissioner and awarded costs of RM10,000.00 to the Defendant.

(o) The Plaintiff subsequently applied to the Federal Court for leave to appeal under Federal Court Civil Application No. 08(f)-26-01/2013(S). The said application was dismissed by the Federal Court on 26.03.2013 with costs of RM20,000.00 to the Defendant.'

FINDINGS BY THE LEARNED JUDICIAL COMMISSIONER

[3] Firstly, the learned judicial commissioner found that prayer (1) of the plaintiff's amended statement of claim was never granted by the trial judge. His Lordship also found that the plaintiff never appealed to this court on this issue. Therefore, His Lordship concluded that he was *functus officio* as far as this issue is concerned. As for prayers (ii) and (iii) in the plaintiff's amended statement of claim, His Lordship found that these had been inserted in the sealed judgment order dated 6 July 2006 under encl 99 and therefore saw no reason to seal another order to revise the judgment order dated 6 July 2006. Referring to O 42 r 13 of the Rules of Court 2012 ('the ROC 2012') (the equivalent of O 42 r 13 of the Rules of the High Court 1980 ('the RHC 1980')), the judicial commissioner found that there was inordinate delay in making the application. Under the relevant rules of the court such application must be made within 30 days of the receipt of the order or judgment. In this case the application for variation was made almost seven years after the entry of the judgment. Thus it would prejudice the defendant if the plaintiff's application was to be granted.

[4] Further, the learned judicial commissioner took notice that the judgment obtained by the plaintiff, which the plaintiff sought to amend, had been confirmed by this court and the Federal Court; and the judgment order dated 6 July 2006 had been sealed and perfected and used by the parties in the assessment of damages before the deputy registrar and in the appeal process that followed. The court therefore was *functus officio*.

[5] Finally, the learned judicial commissioner found that there was absence of any clerical slips in the sealed order which otherwise would reflect what was actually pronounced by the trial judge that required amendment through court intervention.

OUR DECISION

[6] For better understanding of the issue in this appeal, it is helpful if we state the chronology of events (which we have summarised from the background facts in judgment quoted above) which is as follows:

11 November 2000	—	The plaintiff took out a writ action against the defendant for breach of contract and conditions and warranties arising from the sale of the generator sets.
28 April 2001	—	The plaintiff's amended the statement of claim without leave pursuant to O 20 r 3 of the RHC 1980 to include new prayer (iii) and amended prayer (i) and (ii).

13 March 2006	—	The trial of the suit commenced before Justice Linton Albert and judgment was reserved.
6 July 2006	—	The learned judge delivered judgment in favour of the plaintiff with damages to be assessed by the deputy registrar and costs to be taxed unless agreed. The defendant appealed to the Court of Appeal in Civil Appeal No S-02–800 of 2006 against the whole decision. The defendant relied on the sealed copy of the judgment order in encl 99.
10 August 2006	—	The plaintiff's counsel appeared before the trial judge requesting for clarification of p 11 of the judgment; but the matter was adjourned to 11 August 2006 because counsel for respondent was absent.
11 August 2006	—	The plaintiff's counsel appeared before the trial judge again and it was recorded in the notes of proceedings that the court had noted that 'the damages to be assessed would hereby be Ordered to reflect the fact that prayers (ii) and (iii) were not abandoned'.
8 January 2008	—	The deputy registrar heard encl 102 for assessment of damages. In his opening speech the plaintiff's counsel informed the court that the judgment ordered that the damages should reflect prayers (ii) and (iii) of the plaintiff's amended statement of claim.
22 January 2009	—	The deputy registrar delivered his ruling and awarded RM3,382,222.09 to the plaintiff as damages together with interest at 8%pa from the date of the order until full payment.
23 January 2009	—	The defendant filed a notice of appeal to judge in chambers (encl 158) against the deputy registrar's decision.
14 April 2009	—	The Court of Appeal dismissed the plaintiff's appeal with costs.
13 May 2009	—	The defendant filed a notice of motion for leave to appeal to the Federal Court under Application No 08(f)-102 of 2009(S).
10 December 2009	—	Judicial Commissioner Yew Jen Kie (as she then was) allowed the defendant's appeal to the judge in chambers and set aside the deputy registrar's award of RM3,382,222.09 and substitute it with an award of RM264,000 in damages. The defendant paid the said sum in full to the plaintiff.

31 December 2009	—	The plaintiff filed an appeal to the Court of Appeal under Civil Appeal No S-03(IM) 52 of 2010 against the judicial commissioner's decision.
12 December 2012	—	The Court of Appeal unanimously dismissed the plaintiff's appeal and affirmed the decision of the learned judicial commissioner with costs of RM10,000 to the defendant.
26 March 2013	—	The Federal Court dismissed the plaintiff's application for leave to appeal to the Federal Court under Federal Court Civil Application No 08(f)-26–01 of 2013 with costs of RM20,000 to the defendant.

[7] From the judgment of the learned judicial commissioner, it is apparent that the application by the plaintiff in the court below is to seal a fresh draft order allegedly to reflect the actual orders made by the learned trial judge Linton Albert J on 6 July 2006.

[8] The facts show that the draft order was forwarded to Messrs Norbert Yapp & Assoc, counsel for the defendant for their approval. But vide letter dated 14 January 2013 Messrs Norbert Yapp & Assoc informed the deputy registrar and the plaintiff's counsel that they objected to the draft order on the ground that it was an abuse of the court process and an attempt to rewrite the judgment of the learned trial judge.

[9] It is also pertinent to appraise the original claim by the plaintiff against the defendant as found in the plaintiff's amended statement of claim and as decided by the learned trial judge Linton Albert J.

[10] The plaintiff's claim was grounded on a breach of contract by the defendant for supplying defective power generators. The plaintiff had purchased two generator sets from the defendant. According to the defendant, the generators could generate a power rating of 1000kw each. However on delivery and when the generators were put into operation the exhaust manifold would experience heat and glow red hot when the power production reached 650kw.

[11] The relief sought by the plaintiff in its statement of claim were as follows:

(i) the Defendant repay to the Plaintiff the sum of RM264,000.00 and damages for diesel oil consumption for having to operate other generators sets to make up the power deficit of the two (2) generators for the duration of the life span of the generators sold by the Defendant;

(ii) further or in the alternatives, the Defendant replace two (2) generator sets capable of generating 1000kw at the Defendant's own costs and expenses;

(iii) alternatively, the Defendant within one (1) month from the date of judgment install a brand new generator set capable of actually producing 1000kw at the Defendant's own costs and expenses.

(iv) damages and incidental costs in setting up the two (2) new generator.

[12] Learned counsel for the plaintiff submitted before us that the purpose of the fresh draft order was to reflect the actual order made by the trial judge in the original action by stating expressly prayers (ii) and (iii) of the plaintiff's amended statement of claim; not to add new orders which were not made by the trial judge.

[13] The main argument by the defendant in opposing this appeal is that the court is now *functus officio* and that the application or request for variation of the original order was made almost seven years too late in contravention of O 42 r 13 of the ROC 2012 which provides that any party intending to vary any order or judgment must make the application within 30 days after receipt of the order or judgment. There was no explanation for the delay.

[14] Further learned counsel for the defendant submitted that:

> ... Appellant's attempt to extract the purported Order dated 6.07.2006 after the Federal Court have affirmed the decision of the Court of Appeal on 26.03.2013 is an abuse of the process of court. It cannot be disputed that the decision of the Court of Appeal is premised on the Appellant's appeal against the decision of the Learned JC dated 10.12.2009. As noted above, in coming to her decision the Learned JC had taken into consideration the clarification made by the Learned Trial Judge on 11.08.2006. Since the said Judgment has been affirmed by the Court of Appeal and the Federal Court, it is too late in the day for the Appellant to come back to the Court to extract the revised Order dated 6.07.2006 under the guise of clarification.

[15] Learned counsel for the appellant however submitted that there is no attempt to rewrite the judgment or order of the learned judge. What the appellant seeks to do is, to state clearly in the order, the intention of the decision of the learned trial judge in his judgment after the clarification of the order on 11 August 2006.

[16] A good place to start unraveling the contentious issue between the plaintiff and the defendant is to identify clearly the decision made by the learned trial judge Linton Albert J.

[17] On the totality of the evidence before him, the learned judge found on balance of probabilities that the defendant was in breach of its contract with the

plaintiff that the two units of generators would produce a total of 2000kw, and therefore liable to damages occasioned by the breach. The learned judge also found that the plaintiff incurred fuel consumption and other installation and wiring costs in having to set up extra generator sets to meet the shortfall in electricity required by the defendant. These are findings of facts by the learned trial judge. Based on those findings the learned judge made the following conclusion and ruling:

> Finally, I do not think that the plaintiff is entitled to the reliefs sought in the statement of claim other than damages because they have been abandoned in learned counsel's opening statement where it was stated thus:
>
> > The Plaintiff will be dealing with the issue of liability only at this trial and damages to be assessed upon finding of issue of liability against the Defendant.
>
> For the reasons and in the circumstances aforesaid judgment is entered for the plaintiff with damages to be assessed by the deputy registrar and costs to be taxed unless agreed. Order accordingly.

[18] It is against the above finding and conclusion that learned counsel for the plaintiff sought clarification of the order made by the trial judge. The clarification of the order took place before the trial judge on 11 August 2006 after it was adjourned from the day before because of the absence of learned counsel for the defendant; but not before learned counsel for the plaintiff had addressed the court that the plaintiff did not abandon prayers (ii) and (iii) of the plaintiff's amended statement of claim. However on the 11 August 2006 learned counsel for the defendant was also absent (see notes of proceedings at pp 88–89 appeal record).

[19] After the clarification the learned trial judge made the order that '... damages to be assessed would hereby be Ordered to reflect the fact that prayers 2 and 3 were not abandoned'.

[20] Only after the clarification was the order extracted and sealed after the draft had been approved by the defendant's solicitors and the deputy registrar. The sealed order then read as follows:

> JUDGMENT AFTER TRIAL
>
> The 6th day of July, 2006.
>
> *THIS ACTION* having been called up for decision on the 6th day of July, 2006 *AND UPON HEARING* Edwin Tsen Thau Bing Esq. (Miss Voo Sin Pei with him) of Counsel for the Plaintiffs and Margaret Hon Esqess. of Stand-in Counsel for the Defendants.
>
> *IT IS THIS DAY ORDERED THAT* Judgment be entered against the Defendants and damages to be assessed by the Deputy Registrar to reflect Prayers (ii) and (iii) of the Writ of Summons and costs to the Plaintiffs to be taxed unless agreed.

Dated this 6th day of July, 2006

.....sgd.....

Deputy Registrar

High Court, Sandakan

[21] It is pertinent to note that the learned judge did prepare a short judgment after the clarification of the order. We produced below the short judgment:

Judgment

Is the Plaintiff entitled to the reliefs sought in the Statement of Claim together with general damages to be assessed as submitted in the Plaintiff's opening statement.

Insofar as prayers (ii) and (iii) are concerned, I am of the view that it would be fair for the Defendant to replace an additional general set to make up the deficit of the two old generator sets instead of replacement of two new generator sets taking into account that the two said generator sets had been used for quite some time.

For the reasons aforesaid, I Order that the Defendant do within one (1) month from the date of this Judgment, supply install and set-up in running condition at the plaintiff's factory another new generator set of producing at least 100KW (?) to make up the deficit of the 2 said generator sets at the Defendant's costs and damages to be assessed by the Deputy Registrar and costs to be taxed unless agreed.

Order accordingly.

Signed. YA Tuan Linton Albert, J.

[22] It will be noticed that in the last paragraph of the short judgment, there was a typo error where the figure '100kw' was typed instead of '1000kw'. This however was corrected subsequently — (see judge's secretary letter dated 18 March 2013 at p 39 AR).

[23] The above factors were never considered by the learned judicial commissioner.

[24] Clearly therefore from the records, upon clarification the learned judge was satisfied that the plaintiff had never abandoned prayer (ii) and (iii) of its amended statement of claim. This is obvious from the notes of proceedings in respect of the clarification on 11 August 2006. The proposed draft order prepared by the plaintiff's solicitors to amend the order of the court dated 6 July 2006 to include prayer (ii) and (iii) is in the form produced below:

ORDER

PURSUANT to the Judgment After Trial entered on the 6th day of July 2006 in this action *IT IS HEREBY ORDERED* as follows:

A (i) that the Defendants repay the Plaintiffs a sum of RM264,000.00 and damages for diesel oil consumption for having to operate other generator sets to make up the power deficit of the two said generator sets for the duration of the life span of the two said generator sets;

B (ii) that the Defendants do within one month from the date of Judgment supply install and set up in running condition at the Plaintiffs' factory at Seguntor another brand new generator set of similar make and specifications capable of actually producing at least 1000 KW to make up the power deficit of the two said generator sets at the Defendants own costs inclusive of all incidental costs;

C (iii) interest and costs to be paid by the Defendants to the Plaintiffs.

Dated this 6th day of July 2006

DEPUTY REGISTRAR

HIGH COURT AT SANDAKAN

D Prepared by

___sgd & chop___

Messrs Tan Pang Tsen & Co. Messrs Koh Hiew & Partners

E Solicitors for the Plaintiffs Solicitors for the Defendants

[25] It appears to us that the proposed draft order reflects what was decided by the learned trial judge after the clarification exercise. However, the defendant's solicitors objected to the sealing of the proposed draft order for the F reasons that we have alluded to above.

[26] We can understand the defendant sentiments to object to the proposed draft order. The proposed draft order purportedly to reflect the actual orders made by the learned trial judge Linton Albert J was prepared only on 7 January G 2013, after the appeals by the plaintiff against decision on assessment of damages had failed. Learned counsel for the plaintiff submitted, in his supplementary written submission before us, that the plaintiff wanted to include the orders that the defendant is to supply and install a brand new generator set capable of producing at least 1000kw to make up the deficit of the H two generator sets and the costs of setting up the brand new generator before proceeding to access damages before the deputy registrar.

[27] Learned counsel for the plaintiff submitted that there is no prejudice to the defendant if the proposed draft order is sealed and perfected. In fact he said I that the amendment would make it clearer to the deputy registrar. The assessment would be in relation to the cost of the one unit of 1000kw generator set and the setting up costs. He contended that the assessment before the deputy registrar before this (and which had been set aside by the learned judicial commissioner Yew Jen Kee (as she then was) on appeal to judge in

chambers by the defendant; and which decision was affirmed by this court on appeal by the plaintiff) was about damages suffered by the plaintiff on extra fuel cost resulting from the two defective generator sets which were supplied by the defendant. The damages on the cost of replacing and installing a new generator set of 1000kw capacity as ordered by the learned trial judge Linton Albert had not been considered or assessed.

[28] We agree with this submission by learned counsel for the plaintiff. We have carefully scrutinised the ruling by the deputy registrar on the assessment of damages delivered on 8 January 2008. We are satisfied that in the assessment of damages the deputy registrar was dealing mainly with the plaintiff's claim for the cost of extra diesel used (see pp 32–34 and p 38 of the supplementary appeal record). Likewise when the said ruling on the award by the deputy registrar was appealed to judge in chambers, the learned judicial commissioner then was only concerned with evidence by the plaintiff to prove the extra fuel cost and set aside the award of RM3,382,222.09 awarded by the deputy registrar — (see pp 121–124 appeal record).

[29] Going back to the first sealed order of the judgment by the trial judge after the clarification, it is without doubt that reading the order, the trial judge's intention was to grant the plaintiff's prayers (ii) and (iii) of its statement of claim. The effect therefore is that the defendant is required to replace two defective generator sets with two brand new ones. It follows that if the defendant is unable to do so then the assessment of damages must reflect the cost suffered by the plaintiff in replacing and installing the new set of generators on their own. But this alternative prayer was never considered by the learned deputy registrar in her assessment of damages or for that matter, by the learned judicial commissioner who heard the appeal in chambers.

[30] In the circumstances we are of the view that there are merits in the appeal by the plaintiff.

[31] The question is whether the court has the power to allow the amendment to court order of 6 July 2006 after it had been perfected and sealed? Learned counsel for the plaintiff referred to us the case of *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 to support the proposition that the court has the discretion to amend any orders at any time to reflect what had been ordered in fact. In that case it was held by Peh Swee Chin J that before an order has been perfected the court has inherent jurisdiction to review the matter. However when an order is extracted and perfected, the court can still review the same but only with the consent of both parties, or as expressly provided under the Rules of Court. However with respect to this power to review the order, the court said this:

> ... the nature of this power is not a blanket one; it is subject to a restriction which is, to correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or error arising from accidental slip or omissions as expressly conferred by O 20 r 11 of the Rules of the High Court 1980.

[32] It is also established principle that the court has inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain — see *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 (CA), *Pearlman (Veneers) SA Pty Ld v Bernhard Bartels* [1954] 1 WLR 1457 and other cases cited in the *Supreme Court Practice 1993* Vol 1 Part 1 London Sweet & Maxwell.

[33] In *Henry William Hatton v Hugh Harris* [1892] AC 547 Lord Watson said:

> Where an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in Order to bring in harmony with the Order which the judge obviously meant to pronounce.

[34] On the above authorities we are satisfied under the circumstances of the case under appeal the proposed amendment to the court order dated 6 July 2006 albeit done quite late in the day is well within the power of the court to entertain. The proposed draft order in our view is not to introduce something new or never decided by the trial judge. The purpose is, as suggested by learned counsel for the plaintiff and to which we agree, namely to clarify the orders intended by the trial judge, so that prayers (ii) and (iii) of the statement of claim are given due consideration, in addressing the damages in favour of the plaintiff.

[35] For the above reasons we unanimously allowed this appeal with costs of RM10,000 here and below. Deposit is refunded to the appellant.

Appeal allowed with costs of RM10,000 here and below.

Reported by Dzulqarnain Ab Fatar